No. 14371.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

E. N. MURRAY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant.

APPELLANT'S BRIEF.

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Jurisdictional Statement.

The offense in this case was charged in count one and count four of an indictment, the remaining counts being dismissed. Count one [Clk. Tr. pp. 2 to 5] was for violation of the conspiracy statute (Title 18, U. S. C., Secs. 371, 545, relating to smuggling). Count four [Clk. Tr. pp. 6 to 9] involved a violation for perjury (Title 18, U. S. C., Sec. 1621). The District Court had jurisdiction of the cause under Title 18, Section 3231, which confers on the District Court original jurisdiction of "all offenses against the laws of the United States."

The offense charged was committed in the Southern District of California, Southern Division. It appears that on October 12, 1953, Judgment of Commitment and Sentence was entered on a plea of guilty in which the defendant and appellant, E. N. Murray, was ordered imprisoned for eighteen months on count one, and eighteen months on count four [Clk. Tr. pp. 13-14]. Said sentences of imprisonment were specified to run consecutively. Said appellant is now confined in the Federal Prison Camp, Florence, Arizona.

The appellant made two motions for correction of sentence (Title 28, U. S. C., Sec. 2255) on two different grounds [Clk. Tr. pp. 15 to 16; p. 22]. Both motions were denied, the first by an Order *nunc pro tunc* as of December 22, 1953 [Clk. Tr. p. 18], and the second by Order dated March 30, 1954 [Clk. Tr. p. 23]. Two respective notices of appeal were duly filed [Clk Tr. pp. 24-25]. Thereafter, by stipulation, together with supplemental stipulation, the records on both appeals respectively were consolidated into one record on appeal [Clk Tr. pp. 26-27]. Thereafter, on May 27, 1954, said appeal was duly filed and the cause docketed.

This court has jurisdiction under the provisions of Title 28, United States Code, Sections 1291 and 2255.

Statement of Facts.

This appeal does not involve any questions of fact and there is no reporter's transcript. The appeal is only on questions of law. The case involved psittacine birds.

Questions Involved.

(1) Did the lower court err in denying appellant's motion for correction of sentence (Title 28, U. S. C. Sec. 2255) on the ground that there cannot be assessment of more than one punishment on two different counts arising out of a single agreement to commit substantive separate offenses?

(2) Did the lower Court err in denying appellant's motion for correction of sentence (Title 28, U. S. C., Sec. 2255) on the ground that the punishment assessed under Count One for conviction of conspiracy involving smuggling (Title 18, U. S. C., Sec. 371; Sec. 545) should have been predicated upon the specific statute, namely Title 42, United States Code, Section 271, involving a misdemeanor instead of a felony?

ARGUMENT.

I.

There Cannot Be Assessment of More Than One Punishment on Two Different Counts Arising Out of the Same Transaction.

The general rule is that after trial assessment of punishment must be for one offense or criminal violation. It is the rule in the Federal Courts that a single conspiracy may have for its object and purpose the violation of two or more criminal laws. It is the contention of the appellant that under this rule the sentence on the fourth count for perjury cannot be cumulative or consecutive. Where a criminal prosecution or conviction for violation of a statute penalizing a conspiracy is based upon a single transaction or agreement, no sentence of more than the maximum penalty for a single violation of the conspiracy statute could be validly imposed.

Braverman v. United States (1942), 317 U. S. 49-55.

Illustrative of this rule are many decisions. It was held that where the evidence established a single agreement to rob the mails and to conceal the mail bag and proceeds thereof, only a single conspiracy was established with the result that cumulative sentences upon conviction of two conspiracies constituted improper double punishment for the same offense. *(Murphy v. United States* (1923 C. C. A. 7th), 285 Fed. 801. (Writ of Cert. denied in (1923) 261 U. S. 617).)

Thus where only a single agreement to violate various separate and distinct internal revenue laws of the United States was proven, such agreement being punishable as a criminal conspiracy under Section 37 of the Criminal Code, (18 United States Code, Section 371), and where upon a

conviction on several counts of an indictment, each charging a conspiracy to violate a separate and distinct internal revenue law of the United States, the defendant was sentenced to more than the maximum offense, judgment of conviction was reversed on certiorari in *Braverman v. United States* (1942), 317 U. S. 49-55, cited above, and the cause remanded to the District Court with direction to imposed upon the defendant a sentence for but one violation of the conspiracy statute.

Similarly, where two counts in consolidated indictments were the same, except for the concluding clause, and different only as to the way in which sales of drugs were to be executed, sentences on defendants were reduced from consecutively to concurrently. This case, similarly to the one at bar, involved pleas of guilty. *(United States v. Mazzochi* (1935, C. C. A. 7th), 4 F. 2d 228 (Writ of Cert. denied (1925), 268 U. S. 692).) It was held that punishment did not warrant separate and cumulative penalties, one under a count charging a conspiracy to transport the alcohol from a warehouse, and another count charging a conspiracy to aid and abet in the removal of the alcohol.

In another situation where a plea of guilty was made by the defendant on three counts of an indictment for offenses of conspiracy, habeas corpus was granted. In each of these counts a conspiracy was charged on the same date to commit an offense against the United States. The first conspiracy charge was using the mails to defraud a husband out of certain valuable shares of stock; the second charged the use of the mails to defraud the wife out of certain stock owned by her; and the third charged the obtaining by fraud from the mail two registered letters containing these shares of stock. The prisoner having served more than two years of his sentence, the court

ordered him discharged on the ground that this was a clear case of double punishment and that the two terms of two years each following the first one were void because there was but one conspiracy to commit several offenses.

Sprague v. Aderholt (1930, D. C. Ga.), 45 F. 2d 790.

In another situation where the defendant was convicted on his plea of guilty, cumulative sentences had been imposed on two counts. One charged a conspiracy to remove, deposit and conceal commodities with intent to defraud the United States of the tax imposed thereon, and the other charged a conspiracy to possess large quantities of alcohol, the immediate containers of which did not have affixed the internal revenue stamps. It was evident that the transactions were all one conspiracy. *(Ex parte Rose* (1940, D. C. Mo.), 33 Fed. Supp. 941.) This situation also existed where a defendant on a plea of guilty was convicted of a charge of conspiracy to assault persons having charge, control or custody of mail matter and a charge of conspiracy to rob, steal and purloin mail matter. He had been sentenced to imprisonment for two years on each of the two counts, to run consecutively.

An illustrative case of the principle presently urged by the defendant involved a conspiracy to commit the following offenses: (a) concealment of property by one of the conspirators; (b) making a false oath by another; (c) presenting a false claim by the latter; and (d) fraudulently receiving property by all conspirators after the filing of a petition in bankruptcy. *(Knoell v. United States* (1917, C. C. A. 3rd), 239 Fed. 16 (Writ of Error dismissed in (1918), 248 U. S. 648).)

It is not the contention of the appellant that the governmen would be precluded from prosecuting on different

theories arising out of the same criminal transaction or agreement. It is the contention of the appellant that after trial or conviction, then the punishment must be limited to the single transaction involved. It is anticipated that the government will allege the principal of whether or not each count requires proof of a fact or element not required of others. The appellant respectfully disagrees with this premise in its applicability to the present case. Other than academically, there cannot be any substantial difference in carving out the additional offense of perjury which was in furtherance of the conspiracy to smuggle.

It has not been possible to find any case exactly on point. However, the appellant respectfully presents as an analogous case in support of his position the case of *Erlich v. United States)* C. C. A. Fla., 1944), 145 F. 2d 693. The court held that defendant's alleged falsehoods could not form the basis for a subsequent prosecution for perjury where the gravamen of the original charge was that he had demanded and received excessive prices for meat although he billed the meat at a legal price. The defendant had specified that he had not received an amount greater than that shown by the sales slips evidencing each transaction. This testimony resulted in an acquittal.

Another federal case in support of this proposition generally is *Chitwood v. United States* (Ark. 1910), 178 Fed. 442.

An illustration of the extreme application of the principal of carving out violations from a single transaction is found in the case of *O'Neil v. Vermont* (1891), 144 U. S. 323 (dissenting opinion by Field J.). It was noted that punishments cumulatively inflicted for several violations of a penal statute may, in the aggregate, could come within the constitutional rule against "cruel and inhuman punishments."

II.

The Defendant Should Have Been Sentenced for Violation of Specific Law Punishing Importation of Psittacine Birds, Instead of the General Act.

The general act involves the violation of Title 18, Section 371, for conspiracy relating to the general smuggling statute. Title 18, Section 371, the conspiracy violation, provides in pertinent part as follows:

> "If, however, the offense the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

Thus in the supplemental ground for correction of the sentence, it is respectfully pointed out that charging the violation of the general law, Title 18 United States Code, Section 545, makes a substantial difference to the prisoner with respect to the sentence imposed. Under Section 545, the general smuggling act, the punishment has been increased to imprisonment of as high as two years.

It is respectfully pointed out that Section 545 of Title 18, United States Code, is in conflict with a specific law of Congress which punishes a particular offense. The specific law is Title 42, United States Code, Section 271. This specific law prohibits importation into the United States contrary to regulations of the Surgeon-General. The punishment provided is not more than one year imprisonment or a $1,000.00 fine, or both. Title 42, Code of Federal

Regulations, Section 71.152, entitled "Psittacine Birds," provides in pertinent part as follows:

> "(a) The term includes birds commonly called parrots, amazons, Mexican doubleheads, African grays, cocatoos, macaws, parakeets, lovebirds, lories, lorikeets, . . ."

The balance of the regulation relates to various exceptions, in the prohibition against importation, such as birds for zoological parks or research institutions, two birds owned by an owner for his private residence, namely pets. It is noted that Title 42, United States Code, Section 271, was amended as recently as June 25, 1948 (Chap. 646, Sec. 1, 62 Stat. 909) and Section 71.152 of Title 42, Code of Federal Regulations, was amended as of November 15, 1952 (16 F. R. 11604).

The principle in Penal Law relating to the conflict between a specific and general statute exists when two statutes punish exactly the same act or omission as crimes. The rule of strict interpretation of a criminal statute prohibits the punishment of the defendant under the general statute which provides for a larger penal servitude. This principle has been stated in different forms in the interpretation of such a situation. Federal cases in support thereof are as follows:

United States v. Mueller, 178 F. 2d 593;

United States v. Palmer, 112 F. 2d 922;

United States v. Curione, 11 F. 2d 471;

United States v. Yuginovich, 256 U. S. 450;

United States v. Reed, 274 Fed. 724.

In the *Mueller* case, *supra,* decided in the Fifth Circuit, the defendant was charged with transportation of imported lottery tickets in violation of a provision in the Tariff Act prohibiting the smuggling and clandestine importation of merchandise, lottery tickets. The Appellate Court held that the charge should have been brought under the specific statute dealing with the subject of importation and interstate carriage of lottery tickets.

It is urged that the sentence cannot stand for the reasons and authorities given.

Respectfully submitted,

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Attorney for Appellant.